LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 1 1971
E. ROBERT SEAVER, CLERK

No. 71-155

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN OLIVER SNOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-155

JOHN OLIVER SNOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Southern District of Ohio, petitioner was convicted on six counts charging (1) purchase and distribution of heroin not from a stamped package, in violation of 26 U.S.C. (1964 ed.) 4704(a); (2) a similar violation as to cocaine; (3) concealing unlawfully imported heroin, in violation of 21 U.S.C. (1964 ed.) 173; and (4) a similar violation as to cocaine; (5) concealment of a firearm during commission of a federal felony, in violation of 18 U.S.C. 924(c)(2); and (6) purchasing another firearm after conviction of a felony in violation of 18 U.S.C. App. 1202(a)(1). Sentences aggregating twenty-one years' imprisonment were imposed, 10 years on each of counts 1

443-114—71

and 2; 10 years on counts 3 and 4 to run concurrently with each other but consecutively to 1 and 2; and an additional one year sentence on counts 5 and 6. The court of appeals affirmed.

Petitioner seeks reversal of his conviction on the ground that the vigorous closing argument of government counsel, inveighing against drug traffic, denied him due process of law. The court of appeals found the prosecutor's argument improper, but the error harmless. *Kotteakos* v. *United States,* 328 U.S. 750. Cf. *Chapman* v. *California,* 386 U.S. 18 (standards for harmless constitutional error). See *Chatman* v. *United States,* 411 F. 2d 1139 (C.A. 9); *Tenorio* v. *United States,* 390 F. 2d 96, 99 (C.A. 9). The court's conclusion that any impropriety in the prosecutor's summation was harmless error is well founded.

On April 16, 1970, Detectives of the Hamilton County, Ohio, Sheriff's Department and Special Agents of the Alcohol, Tobacco and Firearms Division of the Treasury Department, having been informed that petitioner had been observed by a hotel busboy in possession of a gun and a quantity of money, approached the petitioner at the hotel and asked if he had a gun, which he denied. They asked for and obtained consent to search the petitioner's car. Petitioner removed from the trunk a cloth bag containing a box, which he opened showing that it contained no gun. The officers recognized implements used in the narcotics trade and after brief questioning and a scuffle arrested the petitioner.

A search of the petitioner revealed a .25 caliber automatic concealed on his person. Searches of his car

revealed a second handgun and the heroin and cocaine introduced at trial.

Petitioner also argues that he was denied due process of law with respect to his defense of insanity (based on his narcotics addiction) because a verdict of not guilty by reason of insanity would result in his immediate release—a result which a jury would find intolerable. Such a consequence is by no means the invariable result of an acquittal by reason of insanity in federal courts.[1] In any event, however salutory it would be for Congress to legislate more explicitly in this area, nothing in the Constitution requires Congress to provide either special institutionalization or treatment for insane defendants.

Finally petitioner contends that counts 1 and 2, charging the "purchas[ing] distribut[ing] *and* dispens[ing]" of narcotics improperly "contain at least 3 separate and distinct offenses" (Pet. 9). An indictment may properly charge that a statute which may be violated in several ways was violated in each of those ways. *Turner* v. *United States*, 396 U.S. 398, 420 (so construing an indictment charging violation of 26 U.S.C. 4704(a), the statute involved in this case). Nor is petitioner correct in concluding that conviction on count 5 precluded conviction on count 6; not only

[1] See *Lyles* v. *United States*, 254 F. 2d 725 (C.A.D.C.), certiorari denied, 356 U.S. 961; *Pollard* v. *United States*, 285 F. 2d 81 (C.A. 6); *United States* v. *Freeman*, 357 F. 2d 606, 625–626 (C.A. 2); *Pope* v. *United States*, 372 F. 2d 710, 731–732 (C.A. 8) (*en banc*), reversed and remanded on other grounds, 392 U.S. 651; 24 U.S.C. 211; Goldstein, *The Insanity Defense*, 143 *et seq.* (1967).

are the elements of the offense different, but the charges related to different handguns.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE, 1971